

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

FILED
FEB 09 2015
Clerk, U.S. District Court
District Of Montana
Missoula

MICHAEL P. DUNSMORE,

Petitioner,

vs.

LEROY KIRKEGARD, et al.,

Respondents.

CV 14-73-H-DLC

ORDER

United States Magistrate Judge R. Keith Strong entered his Findings and Recommendation on December 8, 2014 recommending that Dunsmore's petition for habeas corpus be dismissed without prejudice. Dunsmore timely objected to the Findings and Recommendation on December 19, 2014, (Doc. 5) and is therefore entitled to *de novo* review. 28 U.S.C. § 636(b)(1). The portions of the findings and recommendations not specifically objected to will be reviewed for clear error. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). "Where a petitioner's objections constitute perfunctory responses argued in an attempt to engage the district court in a rehashing of the same arguments set forth in the original habeas petition, the

applicable portions of the findings and recommendations will be reviewed for clear error.” *Rosling v. Kirkegard*, 2014 WL 693315 (D. Mont. 2014) (citations omitted).

On February 9, 2015, Dunsmore filed an “Amendment to and Motion to Vacate Conviction and Dismiss Charge” (Doc. 7) which was docketed as objections to the Findings and Recommendation. The objections in this filing are untimely and are therefore not entitled to *de novo* review. 28 U.S.C. § 636(b)(1). To the extent that this filing is construed as a motion requesting relief, the filing is premature as Dunsmore has yet to exhaust his claims in state court as discussed in Judge Strong’s Findings and Recommendation and this Order. For the reasons listed below, the Court adopts Judge Strong’s Findings and Recommendation in full.

Judge Strong found that Dunsmore had filed an appeal with the Montana Supreme Court following his conviction and sentencing. Dunsmore objects to Judge Strong’s finding that this appeal, which is currently still pending, makes his filing in this Court premature for failure to exhaust his claims in state court. While Dunsmore’s objections state that the Montana Supreme Court has dismissed and denied a previous habeas corpus petition filed by Dunsmore, the fact remains that the appeal he filed on February 6, 2014 with the Montana Supreme Court is still


pending. *State v. Dunsmore*, No. DA 14-0087 (Mont. Filed Feb. 6, 2014),
available at <http://supremecourtdocket.mt.gov> (accessed Feb. 6, 2015). Thus,
Dunsmore has not yet exhausted his claims in state court and his federal petition in
this case is premature.

There being no clear error in Judge Strong's remaining Findings and
Recommendation,

IT IS ORDERED that Judge Strong's Findings and Recommendation
(Doc. 4) are ADOPTED IN FULL. Dunsmore's petition (Doc. 1) is DISMISSED
WITHOUT PREJUDICE. A certificate of appealability is DENIED.

IT IS FURTHER ORDERED that the Clerk of Court shall enter by separate
document a judgment in favor of Respondents and against Petitioner.

Dated this 9th day of February, 2015.



Dana L. Christensen, Chief Judge
United States District Court